MUZAMMIL IZAT HASHIM A

v.

PP

COURT OF APPEAL, PUTRAJAYA B
SURIYADI HALIM OMAR JCA
HASAN LAH JCA
SULAIMAN DAUD JCA
[CIVIL APPEAL NO: W-05-66-2003]
12 SEPTEMBER 2008 C

CRIMINAL PROCEDURE: *Trial - Inspection of documents - Application to inspect statements made by witnesses to police - Power of Sessions Court judge and Magistrate to make order thereon - Whether only exercisable pursuant to s. 51 Criminal Procedure Code - Criminal Procedure Code, ss. 51, 112* D

CRIMINAL PROCEDURE: *Revision - Revisionary powers of High court - Order of Sessions Court judge under s. 51 Criminal Procedure Code - Whether appealable - Whether amenable to review by High Court - Criminal Procedure Code, ss. 51, 112, 323 - Courts of Judicature Act 1964, ss. 31, 35* E

This was an appeal against the decision of the High Court dismissing the appellant's application for a review of the decision of the Sessions Court under s. 323 of the Criminal Procedure Code ('the Code'). The facts were that the appellant, who was charged with rape, had made an unsuccessful oral application to the learned Sessions Court judge for him to be supplied with statements made by witnesses to the police under s. 112 of the Code. Being unsuccessful thereat, the appellant filed a written application to the same judge applying essentially for the same order, but the application was dismissed on the ground that the matter had already been adjudicated upon when the oral application was dismissed. The appellant applied to the High Court for a revision of the Sessions Court judge's decision pursuant to s. 323 of the Code read with ss. 31 and 35 of the Courts of Judicature Act 1964 and also under the inherent powers of the court. The learned High Court judge however dismissed the application on the ground that the decision sought to be reviewed was a decision made under s. 51 of the Code, and therefore could only be appealed against (*Dorai Manickam v. R* followed). Being dissatisfied, the appellant hence appealed. F G H I

Held (dismissing appeal)
Per Hasan Lah JCA delivering the judgment of the court:

(1) We agree with the learned High Court judge that the oral application made by the appellant in the Sessions Court was in substance one under s. 51 of the Code. This is because in criminal trials before a Sessions Court or Magistrate's Court, apart from s. 51 of the Code, there is no power for the President or the Magistrate to order the prosecution to produce the document relevant to that case (*PP v. Teoh Choon Teck*). (para 11)

(2) The argument that *Dorai Manickam*'s case is bad law is without merit. Suffice to say that it has been accepted as settled law that except for very good reasons the High Court should not exercise its revisionary powers when a decision complained of is appealable and no appeal has been lodged. (para 12)

(3) As the appellant failed to appeal against the decision of the Sessions Court judge in dismissing his oral application for the documents to be supplied and as the High Court judge could not find any good reason for exercising his revisionary powers in the instant case, we can only agree with the learned Hugh Court judge's decision in dismissing the appellant's application. (para 14)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan terhadap keputusan Mahkamah Tinggi kerana menolak permohonan perayu untuk mengkaji semula satu keputusan Mahkamah Sesyen di bawah s. 323 Kanun Acara Jenayah ('Kanun'). Faktanya adalah perayu, yang menghadapi tuduhan rogol, telah membuat satu permohonan lisan untuk beliau dibekalkan dengan kenyataan yang dibuat oleh saksi-saksi kepada polis di bawah s. 112 Kanun, tetapi gagal. Ekoran kegagalan tersebut, perayu memfail permohonan bertulis kepada hakim yang sama memohon perintah yang lebih kurang sama, tetapi permohonan tersebut juga ditolak atas alasan halperkara sudah diputuskan semasa mahkamah menolak permohonan lisan dahulu. Perayu memohon kepada Mahkamah Tinggi untuk menyemak keputusan yang arif hakim Mahkamah Sesyen tersebut di bawah s. 323 Kanun dibaca bersama ss. 31 dan 35 Akta Mahkamah Kehakiman 1964 serta di bawah kuasa-kuasa sedia ada mahkamah.

Yang arif hakim Mahkamah Tinggi bagaimanapun menolak permohonan atas alasan bahawa keputusan yang hendak disemak adalah dibuat berdasarkan s. 51 Kanun, dan kerana itu hanya boleh dirayui oleh perayu (*Dorai Manickam v. R* diikuti). Tidak berpuas hati, perayu merayu.

Diputuskan (menolak rayuan)
Oleh Hasan Lah HMR menyampaikan penghakiman mahkamah:

(1) Kami bersetuju dengan yang arif hakim Mahkamah Tinggi bahawa permohonan lisan yang dibuat oleh perayu di Mahkamah Sesyen adalah secara intinya merupakan permohonan di bawah s. 51 Kanun. Ini kerana di dalam perbicaraan jenayah di hadapan Mahkamah Sesyen atau Mahkamah Majisteret, selain dari s. 51 Kanun, tiada peruntukan lain yang memberi kuasa kepada Presiden atau Magisteret untuk memerintah pendakwaan supaya mengemukakan dokumen yang berkaitan dengan kes itu.

(2) Hujah bahawa kes *Dorai Manickam* merupakan undang-undang yang salah adalah tidak bermerit. Memadai untuk menyatakan bahawa ianya telah pun diterima sebagai undang-undang yang terpakai bahawa kecuali atas alasan-alasan yang munasabah Mahkamah Tinggi tidak seharusnya melaksanakan kuasa semakannya jika keputusan yang dicabar itu boleh dirayui dan tiada rayuan difailkan terhadapnya.

(3) Oleh kerana perayu gagal merayu terhadap keputusan hakim Mahkamah Sesyen kerana menolak permohonan lisannya supaya dokumen dibekalkan kepadanya dan oleh kerana Mahkamah Tinggi tidak mempunyai alasan-alasan kukuh bagi melaksanakan kuasa semakannya, maka kami hanya mampu bersetuju dengan keputusan yang arif hakim Mahkamah Tinggi menolak permohonan perayu.

Case(s) referred to:
Anthony Gomez v. Ketua Polis Daerah Kuantan [1977] 2 MLJ 24 ***(refd)***
Dorai Manickam v. R [1936] MLJ 261 ***(refd)***
Husdi v. PP [1979] 2 MLJ 304 ***(refd)***
Husdi v. PP [1980] 2 MLJ 80 ***(refd)***
Khoo Siew Bee & Anor v. Ketua Polis, Kuala Lumpur [1979] 2 MLJ 49 ***(refd)***
Liaw Kwai Wah & Anor v. PP [1987] 1 CLJ 35; [1987] CLJ (Rep) 163 SC ***(refd)***

A *Mohd Dalhar Redzwan & Anor v. Datuk Bandar, Dewan Bandaraya Kuala Lumpur [1995] 2 CLJ 209 CA* ***(refd)***
Pg Mahli Pg Noordin v. Dato Hj Abd Rahman [1988] 2 MLJ 581 ***(refd)***
PP v. Raymond Chia Kim Chwee & Anor [1985] 2 MLJ 436 ***(refd)***
PP v. Teoh Choon Teck [1963] 29 MLJ 34 ***(refd)***

B **Legislation referred to:**
Courts of Judicature Act 1964, ss. 31, 35
Criminal Procedure Code, ss. 51, 112, 152, 153, 154, 307, 323(1)
Specific Relief Act 1950, s. 44(1)

C *For the appellant - Hj Sulaiman Abdullah (Charles Hector & MS Raj with him); M/s Charles Hector & Co*
For the respondent - Jamhirah Ali DPP

[Appeal from High Court, Kuala Lumpur; Criminal Application No: 44-23-2003]

D *Reported by Wan Sharif Wan Ahmad*

JUDGMENT

E **Hasan Lah JCA:**

[1] This was an appeal by the appellant against the decision of the High Court of Malaya at Kuala Lumpur on 9 July 2003 which dismissed the appellant's application. We heard this appeal on
F 12 March 2008 and we unanimously dismissed it.

[2] The background facts of the case is as follows. The appellant was charged with an offence of rape in the Sessions Court at Kuala Lumpur on 25 January 2002. In that proceedings his
G counsel made an oral application to be supplied with particulars of the witnesses and their statements to the police and the sketch plan and photographs taken at the scene. The Sessions Court Judge dismissed the application.

H **[3]** On 22 November 2002 the appellant made a written application to the Sessions Court asking for the following orders:

(a) Bahawa sidituduh dibekalkan dengan salinan kesemua pernyataan-pernyataan bertulis yang dibuat oleh suspek-suspek lain, saksi-saksi, pengadu dan mana-mana orang lain
I berkenaan kes ini yang telah dibuat semasa penyiasatan mengenai kes ini dan/atau yang berkenaan dengan kes ini;

(b) Bahawa sidituduh dibekalkan dengan Rajah Kasar serta kunci Rajah Kasar, Lakaran atau Peta dan Gambar Foto yang diambil berkenaan tempat kejadian di mana hal perkara yang dinyatakan dalam kertas pertuduhan telah berlaku;

(c) Bahawa sidituduh dibekalkan dengan nama kesemua suspek-suspek lain, saksi-saksi, pengadu dan mana-mana orang lain berkenaan kes ini;

(d) Bahawa sidituduh dibekalkan apa-apa dokumen, laporan, laporan perubatan, laporan polis, laporan kimia, laporan DNA serta senarai/maklumat bahan-bahan yang berkenaan dengan kes dan pertuduhan terhadap sidituduh;

(e) Bahawa sidituduh dibekalkan dengan maklumat mengenai kawat cam serta nama mereka yang mengambil bahagian dalam kawat cam termasuk nama-nama suspek lain yang dihadapkan di hadapan kawat cam;

(f) Bahawa sidituduh dibekalkan dengan laporan polis yang menyatakan gari telah digunakan dalam insiden halperkara pertuduhan ATAU secara alternatif mendapat pengesahan bahawa laporan sedemikian tidak pernah wujud;

(g) Perintah bahawa kesemua yang diminta dalam permohonan ini dibekalkan kepada sidituduh dalam masa sepuluh (10) hari daripada tarikh perintah;

(h) Lain-lain perintah yang Mahkamah yang mulia fikirkan adil dan wajar.

Looking at the notes of proceedings of the High Court on 9 July 2003 it appears that the only documents in contention are the statements of the witnesses under s. 112 of the Criminal Procedure Code ("the Code") ie, prayer (a) of the application.

[4] The application was fixed for hearing on 28 February 2003. The date was then brought forward to 17 February 2003. A request for adjournment by counsel was rejected by the Sessions Court Judge and the application was withdrawn. The accused then refiled a similar application on 27 February 2003. It was fixed for hearing on 19 March 2003. On that day the application was dismissed by the Sessions Court Judge on the grounds that the matter has already been adjudicated upon when the oral application was dismissed.

[5] On 23 April 2003 the appellant filed a notice of motion in the High Court seeking for a similar order in the exercise of its revisionary powers under s. 323 of the Code, ss. 31 and 35 of the Courts of Judicature Act 1964 and the inherent powers of the High Court. The learned High Court Judge dismissed the appellant's application on the following grounds:

> It would appear that the oral application made by the accused in the Sessions Court is in substance one under section 51 though in form it was not. Perhaps it was dismissed as the prescribed procedure was not followed. The proper remedy that the accused ought to have pursued would have been to have appealed against the order made. He did not do that. The application before me is therefore wrong in law. No arguments were addressed to me as to why I should exercise my powers of revision in the circumstances of the case. Accordingly, I dismissed the application.

[6] Section 31 of the Courts of Judicature Act 1964 provides that the High Court may exercise powers of revision in respect of criminal proceedings and matters in subordinate courts in accordance with any law for the time being in force relating to criminal procedure and s. 35 of the said Act confers on the High Court a general supervisory and revisionary jurisdiction over all subordinate courts. Section 323(1) of the Code empowers a judge to call for and examine the record of any proceedings before any inferior criminal court for the purpose of satisfying himself as to the correctness, legality or propriety of any finding, sentence, or order recorded or passed.

[7] In *Liaw Kwai Wah & Anor v. Public Prosecutor* [1987] 1 CLJ 35; [1987] CLJ (Rep) 163 the Supreme Court held that the High Court's power sitting in revision is discretionary and it must be exercised judicially and within the limits and in the spirit of the legislation. Abdul Hamid CJ (Malaya) stated the object of revision as follows:

> We could observe that the power of revision is to be exercised in accordance with the law for the time being in force relating to criminal procedure. In the present case that law is the Criminal Procedure Code. We would also observe that the object of the revisionary powers provided for in the Code is:

> ... to confer upon criminal courts a kind of paternal or supervisory jurisdiction, in order to correct miscarriage of justice arising from misconception of law, irregularity of procedure, neglect of proper precautions or apparent harshness of treatment, which has resulted on the one hand in some injury to the due maintenance of law and order, or on the other hand, in some undeserved hardship to individuals.
>
> *(Emperor v. Nasrullah & Others* [1928] AIR All 287)
>
> It is also clear that the High Court may examine the record of proceedings in the subordinate courts "wherever it considers that in doing so the purpose of justice will be served, as for example, when the record discloses no offence or when the accused is subjected to a vexatious and groundless prosecution. *(Ramanathan Chettiyar v. Subrahmanya Ayyar* IRC 47 Mad 722)

[8] In his judgment the learned High Court Judge referred to and relied on the decision of the Supreme Court in *PP v. Raymond Chia Kim Chwee & Anor* [1985] 2 MLJ 436 where it was held *inter alia* that a decision or order made under s. 51 of the Code is a final order in the sense that it is final in its effect and therefore appealable under s. 307 of the Code. The other case referred to by the learned High Court Judge in his judgment is *Dorai Manickam v. R* [1936] MLJ 261 where it was held that where a party to criminal proceedings who has had the opportunity to appeal neglects, without very good reasons, so to do, he will not be allowed to call in aid the High Court's revisionary powers.

[9] Learned counsel for the appellant submitted that the learned High Court Judge erred in his finding that the oral application made to the Sessions Court Judge was in substance under s. 51 of the Code. It was his submission that the application was not made under s. 51 of the Code as the appellant did not mention s. 51 in his application either before the Sessions Court Judge or in the High Court. Furthermore, application under s. 51 is too narrow in that it must have regard to ss. 152, 153 and 154 of the Code. Learned counsel cited the following cases to show that such application need not be made under s. 51 of the Code:

(a) *Husdi v. Public Prosecutor* [1979] 2 MLJ 304; [1980] 2 MLJ 80;

(b) *Anthony Gomez v. Ketua Polis Daerah Kuantan* [1977] 2 MLJ 24;

A (c) *Khoo Siew Bee & Anor v. Ketua Polis, Kuala Lumpur* [1979] 2 MLJ 49;

(d) *Pg. Mahli bin Pg. Noordin v. Dato Haji Abd. Rahman* [1988] 2 MLJ 581.

B **[10]** We observed that in those cases cited by learned counsel for the appellant the applications were made under s. 44(1) of the Specific Relief Act 1950 to the High Court. In the instant case the oral application for copies of documents especially the police statements was made to the Sessions Court Judge and as such the C powers of the High Court in s. 44 of the Specific Act 1950 was not an issue in the instant case. What was in issue here was the revisionary powers of the High Court.

[11] We agree with the findings of the learned High Court Judge D that the oral application made by the appellant in the Sessions Court was in substance one under s. 51 of the Code. This is because in criminal trials before a Sessions or Magistrate's Court apart from s. 51 of the Code there is no power for the President or the Magistrate to order the prosecution to produce the E document relevant to that case (see *Public Prosecutor v. Teoh Choon Teck* [1963] 29 MLJ 34).

[12] Learned counsel for the appellant also submitted that the principle of law stated in *Dorai Manickam*'s case is a bad law F because the High Court is conferred with extensive powers of revision in criminal proceedings under s. 323 of the Code and s. 35 of the Courts of Judicature Act 1964 and alternatively he submitted that *Dorai Manickam*'s case does not set out that principle of law at all. We found no merit in that argument. Suffice G to say that it has been accepted as settled law that except for very good reasons the High Court should not exercise its revisionary powers when a decision complained of is appealable and no appeal has been lodged. In *Mohd Dalhar Redzwan & Anor v. Datuk Bandar, Dewan Bandaraya Kuala Lumpur* [1995] 2 CLJ H 209 at p. 219 Gopal Sri Ram JCA, said:

> The second principle of settled law is that, save in exceptional cases and for very good reasons, there can be no resort had by a party to the revisionary jurisdiction of the High Court when the decision complained of is appealable and no appeal has been I lodged. *Dorai Manickam v. R* [1936] MLJ 261.

[13] As the only document being disputed is the statement of the witnesses under s. 112 of the Code it is pertinent to mention here that in *Husdi v. Public Prosecutor (supra)* Syed Othman FJ (sitting as a High Court Judge) held that the right to inspect a statement to the police made in the course of police investigations, which is a statutory, not a common law, creature, would depend on the construction of the relevant statutory provisions, particularly those under the Code and there is no provision in the Code or the Evidence Act which gives a right to inspect such a statement. When the matter came before the Federal Court in *Husdi v. Public Prosecutor* [1980] 2 MLJ 80 the only issue argued was whether the accused is entitled to a copy of the statement of a witness when it is sought to impeach the credit of the witness. The Federal Court held that when a prosecution witness is being cross-examined and the defence seeks to impeach his credit, the court should at the request of the defence refer to his police statement, and may then, if the court thinks it expedient in the interest of justice, direct the defence to be supplied with a copy. With regard to the decision of Syed Othman FJ Suffian LP said at p. 82:

> Our conclusion is not inconsistent with judgment of Syed Othman FJ in *Husdi v. Public Prosecutor*, (2) out of which arises this reference, which dealt with the wider question whether or not the defence is entitled in advance of the trial to copies of police statements of prosecution witnesses, and which he answered in the negative, which answer was not challenged before us.

[14] As the appellant failed to appeal against the decision of the Sessions Court Judge in dismissing his oral application for the documents to be supplied and as the High Court Judge could not find any good reasons for exercising his revisionary powers in the instant case we agree with the learned High Court Judge's decision in dismissing the appellant's application. This appeal was therefore devoid of merits and accordingly we dismissed the appeal.